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No. 97-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EASTMAN KODAK COMPANY,
Petitioner,
v.
IMAGE TECHNICAL SERVICES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Advanced Systems, Inc.; AmTech Equipment Maintenance, Inc.; Atlanta General Microfilm Co., Inc. and Datek Ltd.; Data Prox Equipment Co.; Image Technical Service, Inc.; JESP Company, Inc.; Micrographics Service, Inc.; Omni Micrographics Services, Inc.; and Shields Business Machines, Inc. state that they have no parent corporations and have no subsidiaries, other than wholly owned subsidiaries, and no affiliates that have issued shares to the public.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Following remand from this Court some six years ago, *see Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992) (*Kodak*), a jury found that Kodak had unlawfully attempted to monopolize, and in fact monopolized, the service of certain Kodak equipment, in violation of 15 U.S.C. § 2. The jury awarded damages of $71.8 million (after trebling), and the district court issued an injunction to bar future unlawful acts. The Ninth Circuit affirmed with respect to liability, though it modified both aspects of the relief awarded.

1. Respondents brought this suit in 1987, alleging, *inter alia*, that Kodak had unlawfully used its monopoly power over parts for Kodak photocopier and micrographics equipment to seek and obtain monopoly power over serv-

ice of that equipment.[1] Respondents alleged that Kodak engaged in a multi-faceted scheme, consisting of the refusal to deal in parts manufactured by Kodak, the control of sale of parts by original equipment manufacturers, agreements to prevent resale of parts, and the imposition of sanctions on those dealing with respondents. The district court entered summary judgment for Kodak. Although the court found that Kodak had a "natural monopoly over the market for parts it sells under its own name," 1989-1 CCH Trade Cases ¶ 68,402, at 60,213, it rejected the Section 2 claim on the ground that a unilateral refusal to sell those parts was not a violation of that section. *Id.*

The Ninth Circuit reversed. *See Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990). Although it agreed with the "general rule" that even a monopolist "had no duty to deal with its competitors," 903 F.2d at 620, it stated that a monopolist could not refuse to do so "in an exclusionary attempt to impede competition without a legitimate business reason." 903 F.2d at 620 (*citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985)).[2] Looking to the three possible business justifications advanced by Kodak at the time, the court found "triable issues of fact

[1] Respondents also alleged, pointing to one of the several acts that collectively formed the basis of the Section 2 claims, that Kodak had engaged in illegal tying practices in violation of Section 1. Following the remand from this Court, the tying claims were upheld against motions for summary judgment and for judgment as a matter of law. Because respondents ultimately elected to submit only their Section 2 claims to the jury, and because the Section 2 claims are the basis of the judgment now before this Court, we will primarily discuss the history of the case as it relates to those claims.

[2] The court of appeals also observed that "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications." 903 F.2d at 620 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973)).

as to whether [the] first two proffered reasons are genuine rather than pretextual," 903 F.2d at 620, and determined the third to be insufficient as a matter of law. 903 F.2d at 620. Although the court expressed some uncertainty about "whether the service of Kodak equipment could be a relevant market" (903 F.2d at 620), and, if so, whether Kodak might be found to have monopoly power in it, it concluded that it could not rule out the existence of a service market as a matter of law, 903 F.2d at 621, and that plaintiffs had presented sufficient evidence of market power to withstand summary judgment. 903 F.2d at 621.

This Court affirmed the Ninth Circuit. *See Kodak*, 504 U.S. at 480-86. The Court reiterated the well-established two-part test for monopolization: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" 504 U.S. at 481 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). It then found that respondents had come forward with enough proof on these requirements to create triable issues.

The Court determined that "[t]he existence of the first element, possession of monopoly power, is easily resolved," 504 U.S. at 481, pointing to, among other things, the fact that Kodak controlled "80% to 95% of the service market." *Id.* The Court noted the existence of a "triable claim that service and parts are separate markets, and that Kodak has the 'power to control prices or exclude competition' in service and parts." 504 U.S. at 481 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). In particular, the Court explicitly rejected Kodak's argument "that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act." 504 U.S. at 481. Rather, the Court recognized that "[b]ecause service and

parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines." 504 U.S. at 482. It concluded that "[t]he proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." 504 U.S. at 482 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).

Turning to "[t]he second element of a § 2 claim" (504 U.S. at 482)—that is, "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor' " (504 U.S. at 482-83 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948))—the Court stated: "If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." 504 U.S. at 483. The Court acknowledged "that as a general matter a firm can refuse to deal with its competitors," 504 U.S. at 483 n.32, but held that "such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." 504 U.S. at 483 n.32 (citing *Aspen Skiing*, 472 U.S. at 602-05). The Court noted evidence that Kodak had engaged in a scheme of willful monopolization and explained, therefore, that the case turned on "whether 'valid business reasons' can explain Kodak's actions." 504 U.S. at 483 (quoting *Aspen Skiing*, 472 U.S. at 605). At that time, Kodak made no mention of protection of intellectual property but defended its actions on three other grounds, all of which this Court rejected as bases for summary judgment. The Court decided that one reason (to prevent "free-riding") was inadequate as a matter of law and that the other two reasons (to protect service quality and to improve inventory management) were inconsistent both with the record and with Kodak's own actions and thus presented factual issues for trial. 504 U.S. at 483-86.

2. After remand, the case eventually proceeded to trial. Upon the close of evidence, respondents elected to simplify the case and, dropping the Section 1 tying claim, submitted to the jury only the monopolization and attempted monopolization claims. The jury found Kodak liable on both claims. It awarded damages of more than $12 million (before trebling) for lost service profits and more than $11 million (before trebling) for lost profits on used equipment sales. To prevent further harm, the district court issued an injunction requiring Kodak to sell parts on "reasonable" and nondiscriminatory terms. Pet. App. 84B.[3] Although Kodak argued that its refusal to sell parts was grounded in a desire to protect intellectual property rights, the district court stated that "neither the record nor the verdict supports Kodak's contention that its desire to protect intellectual property actually motivated Kodak's parts policy." Pet. App. 88B. The court added: "To the contrary, it is clear that protection of intellectual property was a pretextual, post-hoc justification of Kodak's parts policy." Pet. App. 88B.

The Ninth Circuit affirmed the judgment as to liability. Reviewing "the extensive record developed at trial," Pet. App. 8A, the court of appeals concluded that respondents had presented sufficient evidence of market power over parts and service. *See* Pet. App. 8A-23A; 31A-33A. The court further found substantial evidence that Kodak was able to maintain its service monopoly by exercising its power over parts. Although Kodak argued that it lacked market power over parts—basing its argument on a theory that "there are not two relevant parts markets [*i.e.* for

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[3] The Ninth Circuit, on appeal, modified the injunction to eliminate the requirement that the terms be "reasonable." Pet. App. 69A. The court noted, as respondents conceded, that "Kodak is entitled to monopoly prices on its patented and copyrighted parts." Pet. App. 68A. The court upheld most of the damages for lost service profits and remanded for a new trial on damages for lost profits on used equipment sales. Pet. App. 58A-65A.

photocopier and micrographic equipment, respectively], but thousands of individual 'part' markets," (Pet. App. 10A)—the court rejected that theory, stating that "[c]onsideration of the 'commercial realities' in the markets for Kodak parts compels the use of an 'all parts' market theory." Pet. App. 11A.[4] The court went on to observe that "[t]he 'commercial reality' faced by service providers and equipment owners is that a service provider must have access to all parts to compete in the service market." Pet. App. 11A. *See also* Pet. App. 12A ("[i]n the market for Kodak parts, a ready supply of all parts is needed to satisfy service contracts").

The court of appeals also determined that "substantial evidence supports the jury's finding that Kodak controlled a monopoly share in the market for Kodak parts." Pet. App. 19A. The court pointed to a combination of actions by Kodak: manufacture of parts; control of parts manufactured by others; and "discouragement of self-servicing and resale of parts by end users." Pet. App. 19A. The court expressly rejected an argument by Kodak that parts were nonetheless available, finding "substantial evidence showing that parts were virtually unavailable for post-1986 models and often difficult to obtain for older models." Pet. App. 19A.[5] It concluded that, "given the

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[4] The court noted the prior declaration by this Court that the relevant market could " 'be determined only after a factual inquiry into the 'commercial realities' faced by consumers.' " *See* Pet. App. 11A (quoting *Kodak*, 504 U.S. at 482). Although the Ninth Circuit determined that those realities justified use of an all-parts market, it observed that "Kodak's 100% monopoly power over the 30% of parts it manufactures suggests the same potential for control of the service market under an individual part market theory that the jury found using the 'all parts' market." Pet. App. 16A.

[5] The court further found that "the record reflects substantial evidence of entry barriers sufficient to prevent Kodak's monopoly share from self-correcting." Pet. App. 22A.

state of the record, a reasonable jury could conclude that Kodak had a share of the markets for photocopier and micrographic equipment parts of 65% or more." Pet. App. 21A.

The court of appeals also found that respondents had satisfied "[t]he second element of a § 2 monopoly claim" (Pet. App. 23A): "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.' " Pet. App. 23A (quoting *Kodak*, 504 U.S. at 482-83) (internal quotes omitted). In this case, as the court recognized, respondents had alleged that "Kodak used its monopoly over Kodak parts to gain a monopoly over the service of Kodak equipment." Pet. App. 23A. Analyzing this claim, the court of appeals specifically noted the statement of this Court, during its prior consideration of this case, that " '[i]f Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2.' " Pet. App. 23A (quoting *Kodak*, 504 U.S. at 483). The court declined to accept Kodak's argument that all refusals to deal must be analyzed according to the terms of the "essential facilities" doctrine, Pet. App. 25A-31A, saying that "[t]he Supreme Court has never explicitly held that a § 2 refusal to deal claim can only be established under the 'essential facilities' rubric." Pet. App. 28A. *See also* Pet. App. 28A-31A (discussing fact that neither *Kodak* nor *Aspen Skiing* employed the essential facilities doctrine by its terms). The court thus applied the standard repeatedly utilized by this Court: a Section 2 violation may be found to the extent that a monopolist engages in exclusionary conduct "harm[ing] the competitive process in the absence of a legitimate business justification." Pet. App. 26A (citing *Kodak*, 504 U.S. at 483 n.32, which cited *Aspen Skiing*, 472 U.S. at 602).

The Ninth Circuit then found that the evidence "establish[ed] Kodak's monopoly power in the service market." Pet. App. 32A. Applying a "plain error" standard, because of a procedural default by Kodak, *see* Pet. App. 32A, the court pointed to evidence that "Kodak has a 95% share of the Kodak high volume photocopier service market and an 88% share of the Kodak micrographic service market." Pet. App. 33A. In this regard, the court again recognized that competing service providers were unable to obtain parts sufficient to become significant service competitors and that, as older models were phased out, those difficulties would worsen. Pet. App. 33A. The court also relied on evidence "that Kodak earns supracompetitive profits in service, and overall." Pet. App. 33A. There was thus "[s]ubstantial evidence [to] support[] the jury's verdict on the issue of Kodak's service market monopoly." Pet. App. 33A.

Finally, the Ninth Circuit considered the purported business justifications for Kodak's practices. As an initial matter, it made clear that "[w]hen a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate § 2 of the Sherman Act." Pet. App. 33A-34A (citing *Kodak*, 504 U.S. at 483). The court then examined in detail one justification proffered by Kodak for its refusal to deal with respondents: the protection of copyright or patent rights. Recognizing as a general principle "the right of a patent or copyright holder to refuse to sell or license protected work," Pet. App. 41A, the court expressed "serious concern" about the potential "effect of claims based upon unilateral conduct on the value of intellectual property rights . . . ." Pet. App. 46A.[6] The court thus established a rule that "a

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[6] The court later observed that antitrust suits, unless properly cabined, "will reduce a patent holder's 'incentive . . . to risk the

monopolist's 'desire to exclude others from its [protected] work is a presumptively valid business justification for any immediate harm to consumers.' " Pet. App. 48A (quoting *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1187 (1st Cir. 1994)). The court further concluded that jury instructions, in cases like this one, must reflect this protection of intellectual property rights.

The court of appeals held, however, that "[t]he presumption may . . . be rebutted by evidence of pretext," Pet. App. 51A, reasoning that "[n]either the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." Pet. App. 51A (citing *Kodak*, 504 U.S. at 484) (ruling out purported justification as "pretextual"). It then found convincing evidence of "pretext" here. In particular, the court observed that the refusal to sell parts to respondents was an across-the-board refusal: that is, that "no distinction was made by Kodak between 'proprietary' parts covered by tooling or engineering clauses and patented or copyrighted products." Pet. App. 51A. Pointing out that "Kodak photocopy and micrographics equipment requires thousands of parts, of which only 65 were patented," Pet. App. 52A, the court distinguished this case from "other cases involving refusals to license patents," Pet. App. 52A, remarking that it "concerns a blanket refusal that included protected and unprotected products." Pet. App. 52A. *See also* Pet. App. 51A (statement by Kodak official that patents " 'did not cross [his] mind' ").[7] As

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often enormous costs in terms of time, research, and development.' " Pet. App. 47A (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974)).

[7] Although described as a "parts manager," Pet. 15; Pet. 51A, that witness actually was the official who crafted the parts restrictions for Kodak and thus was the person at Kodak most knowledgeable about the intent and effect of the restrictions.

a result, the court found it harmless error that the district court had not identified protection of intellectual property as a legitimate justification in its instructions, regarding it as "more probable than not that the jury would have found Kodak's presumptively valid business justification rebutted on the grounds of pretext." Pet. App. 52A.

ARGUMENT

The Ninth Circuit in this case, having reviewed "the extensive record developed at trial" (Pet. App. 8A), upheld a jury verdict that Kodak unlawfully monopolized the service market for certain Kodak equipment. In so doing, the court of appeals specifically relied on evidence that access to Kodak parts was necessary to compete in the service market (Pet. App. 11A, 12A, 15A, 16A); that Kodak exercised monopoly power over the market for parts (Pet. App. 19A, 21A, 22A); that Kodak used its monopoly power to deny access to parts to rivals in the service market (Pet. App. 23A-31A); that Kodak parts were not otherwise available in adequate supply (Pet. App. 19A); and that, as a result, Kodak was able to exercise monopoly power in the service market as well (Pet. App. 32A-33A). The court further noted that Kodak had no legitimate business justification for its conduct, pointing in particular to the compelling evidence that protection of intellectual property rights had played no role in the decision to block access to Kodak parts (Pet. App. 51A-52A).

Although Kodak now attacks the decision below on a variety of grounds, none of its arguments merits further review. First, Kodak argues that it should be exempt or immune from antitrust liability for its refusal to sell patented or copyrighted parts to its service rivals. The Ninth Circuit, however, extended considerable protection to intellectual property holders, declaring that a decision to profit from patented or copyrighted matter was presumptively a legitimate business justification for refusals

to sell. Pet. App. 48A. The problem for Kodak with that rule was a case-specific one: its refusal to sell the small number of patented or copyrighted parts was simply an undifferentiated piece of a larger, across-the-board refusal to sell *any* parts. Pet. App. 51A-52A. Because Kodak offered no legitimate justification for its refusal to sell parts not subject to patents or copyrights, and because its policy was uniform with respect to all parts, the court of appeals reasoned that, in this particular case, the belated claim of reliance on intellectual property rights was pretextual. Pet. App. 52A. Kodak is thus left in the awkward position of claiming in the abstract that the intellectual property laws require, as an incentive for invention, that patent or copyright holders be able to use their rights even as a pretext to justify anticompetitive conduct taken for other reasons. None of the authority cited by Kodak stands for anything remotely close to that illogical and dangerous proposition.

Second, Kodak asserts that the courts below failed to apply critical elements of the "essential facilities" doctrine, relying instead on the standard repeatedly approved by this Court in prior decisions, including *Kodak* and *Aspen*. *See Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Griffith*, 334 U.S. 100, 107 (1948). But the Ninth Circuit was plainly correct that those decisions —including the decision in this very case—establish that claims based on refusals to deal can be adjudicated by a jury under the long-settled standards applicable to all other Section 2 claims and need not be specially framed in "essential facilities" terms. Furthermore, in its review of the jury verdict, the Ninth Circuit did, in fact, find sufficient evidence on each of the elements that Kodak deems crucial: it found that Kodak exerted monopoly power over the parts market (monopoly); that parts were not otherwise available (unavailability); and that access

to parts was necessary to compete in the service markets (essentiality). Kodak naturally disputes those conclusions, but its disagreement on largely factual matters, resolved by the jury here, provides no basis for review by this Court.

The final argument advanced by Kodak—that the finding of aftermarket power is insupportable—is likewise unworthy of review. For the most part, its argument is just an attack on the prior ruling of this Court, a ruling that is law of the case. And its objections to the weight of the evidence—not grounds for review, in any event—are made even less meritorious by a procedural default that led the Ninth Circuit to review the verdict only for plain error. Pet. App. 32A. Applying that standard, the court found ample evidence to support the verdict, Pet. App. 33A, and that conclusion is plainly correct.

1. Kodak, as its first issue, seeks review of a broadly-stated question concerning the relation between the antitrust laws and the patent and copyright laws. But, despite Kodak's wide-ranging discussion, the Ninth Circuit decision raises only a narrow point: that the justification of protecting intellectual property, like other Section 2 justifications, is subject to rebuttal on grounds of pretext. Not only is that holding not in conflict with any decision of this Court or any court of appeals, it is in line with the only other related court of appeals' precedent (which Kodak also condemns). *See Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994). Furthermore, the Ninth Circuit correctly held that "[n]either the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anti-competitive conduct." Pet. App. 51A. For these reasons, review should be denied.[8]

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[8] Because the Ninth Circuit found sufficient evidence of pretext, Pet. App. 51A-52A, this case, as it stands, does not present the more general question whether, as Kodak argues, a nonpretextual

The basic argument advanced by Kodak is that it has an absolute right to deny access to all of the essential, otherwise unavailable parts in order to maintain monopoly power in the service market, even without any other legitimate business justification, simply because approximately one percent of the parts was subject to patents or copyrights. As a general matter, of course, the Ninth Circuit agreed with the proposition that intellectual property holders have a broad right to profit from their works. Recognizing that the patent laws reward beneficial invention by extending "a permissible monopoly over the protected work" (Pet. App. 39A), the court expressed considerable concern about the potential effects of unchecked antitrust claims based on unilateral refusals to deal in patented or copyright articles. Pet. App. 45A-47A. The court found it important to shield intellectual property holders from suits that would be "contrary to the fundamental and complementary purposes of both the intellectual property and antitrust laws, which aim to 'encourag[e] innovation, industry and competition.'" Pet. App. 47A (quoting *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990)).[9]

To achieve this objective, the court of appeals established a presumption that protection of intellectual property rights is a legitimate procompetitive justification for conduct having the effect of excluding competition, but

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reliance on intellectual property rights confers a full and complete immunity from antitrust liability for refusals to deal in patented and copyrighted goods when that refusal allowed the defendant to obtain or maintain a monopoly in a second, downstream service market.

[9] At the same time, the court of appeals acknowledged (Pet. App. 41A) what this Court had said in *Kodak*: that even "power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" 504 U.S. at 479 n.29 (quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611 (1953)).

not an absolute barrier to antitrust attack. Pet. App. 48A. Kodak, naturally enough, has no dispute with the general principle that business decisions with respect to intellectual property are entitled to comprehensive protection under the antitrust laws. What Kodak objects to is the less-than-absolute degree of protection afforded by the Ninth Circuit. Because it found protection of intellectual property to be a species of legitimate business justification, the court, as is customary with other tendered business justifications (*see* pages 15-16 *infra*), conducted an inquiry into whether this justification—potentially legitimate in the abstract—in fact played a role in the exclusionary conduct here. Although Kodak claimed that it had, its eleventh-hour position ran head-on into uncontroverted evidence of Kodak's actual behavior: that is, its refusal to allow access to *any* Kodak parts, whether subject to patents and copyrights or not. *See* Pet. App. 51A ("no distinction was made by Kodak between 'proprietary' parts covered by tooling or engineering clauses and patented or copyrighted products"); Pet. App. 52A; Pet. App. 88B. In light of the fact that Kodak's explanation for its practice was facially inconsistent with the practice itself, the Ninth Circuit reasonably concluded that the justification of protecting intellectual property rights simply had no place in this case. *See* Pet. App. 52A ("[u]nlike the other cases involving refusals to license patents, this case concerns a blanket refusal that included protected and unprotected products").

Given the across-the-board nature of Kodak's refusal to sell parts, it is hardly surprising that its post-hoc reliance on intellectual property rights was rejected. When the case was before this Court, for example, Kodak made no claim that its actions were grounded in the protection of copyright or patent rights. *See Kodak,* 504 U.S. at 483-86. Furthermore, in the district court, Kodak responded several times to interrogatories by stating that patents and copyrights were irrelevant. RT 6162-65. It was not until

1994, seven years after initiation of this lawsuit, that Kodak's counsel asserted a defense based upon the existence of some patented and copyrighted parts. And, as the court of appeals noted, a responsible Kodak official stated that, at the time the parts policy was instituted, "patents 'did not cross [his] mind.' " Pet. App. 51A.[10]

Faced with these facts, Kodak is now forced to argue that, to serve the purposes of the patent and antitrust laws, the presumption must be absolute and irrebuttable. Put another way, Kodak contends that it is entitled to rely on protection of intellectual property rights as a justification even if it is clear, by objective proof, that such protection had nothing at all to do with its policies or practices. But none of the decisions cited by Kodak adopts so absolute a rule even in the face of evidence of pretext. And, in any event, there is very little to be said in favor of Kodak's proposed new *per se* rule of immunity.

As a matter of antitrust law, the idea of a "pretext privilege" seems obviously out of place. In antitrust cases, it is standard for defendants to defend refusals to deal based on business justifications—for example, a need to maintain quality or a lack of available capacity—that (like protection of patent rights) are plainly legitimate in the abstract. The courts, however, do not simply accept the assertions at face-value. Rather, they routinely examine whether, as a matter of fact, the justification is applicable in the particular case. *See, e.g., Aspen Skiing*, 472 U.S. at 608-11; *International Salt Co. v. United States*, 332 U.S. 392, 396-97 (1947); *International Business Machines Corp. v. United States*, 298 U.S. 131, 139-40 (1936).

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[10] The record also contains evidence that Kodak gave parts numbers to patented and copyrighted items, including diagnostic software, and listed them in its catalogue for sale along with other parts. RT 1696, 2149-51; Exh. 440. In fact, Kodak sold patented and copyrighted parts, along with other parts, to self-servicing customers and to ISOs for older micrographic equipment. *Id.*

This Court, indeed, followed precisely that course in its prior review of this case. Addressing the purported justifications for Kodak's refusal to sell parts, the Court found evidence that the first justification—"promot[ing] interbrand equipment competition by allowing Kodak to stress the quality of its service" (504 U.S. at 483)—was "pretextual." 504 U.S. at 484. It noted evidence that "ISOs provide quality service and are preferred by some Kodak equipment owners" (504 U.S. at 483) and, more importantly for present purposes, that the claimed justification was at odds with Kodak's own theories and conduct. It rejected a second justification—"improv[ing] asset management by reducing Kodak's inventory costs" (504 U.S. at 483)—for similar reasons, stating that "Kodak's actions appear inconsistent with any need to control inventory costs." 504 U.S. at 484. All the Ninth Circuit did here was to conclude that another proffered justification—the protection of copyright and patent rights—likewise could not be reconciled with the full extent of Kodak's own actions.[11]

The creation of a "pretext privilege" is also unnecessary to comply with the various intellectual property laws. *See* Pet. App. 51A. Kodak correctly observes that "[t]he purpose of the intellectual property laws is 'to motivate the creative activity of authors and inventors by the provision of a special reward.' " Pet. 10 (quoting

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[11] While Kodak argues that the decision below focuses on "intent" at the expense of more "objective" analysis, Pet. 13-14, that complaint seems largely out of place in this case. While the court of appeals did note testimony by a Kodak official that "patents 'did not cross [his] mind,' " Pet. App. 51A, the principal evidence relied on by the court was evidence of what Kodak *did*: *i.e.*, generally refuse to sell any parts, regardless of whether they were subject to patents or copyrights. In any event, this Court has looked at evidence of monopolistic intent in considering Section 2 claims for more than half a century. *See, e.g., United States v. Paramount Pictures*, 334 U.S. 131, 173 (1948); *United States v. Griffith*, 334 U.S. 100, 106 (1948); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)). What it does not explain, however, is why the "special reward" must include the *pretextual* use of copyright or patent rights as a cover for anticompetitive conduct. The presumption adopted by the Ninth Circuit was intended to assure—and, properly implemented, will assure—that actions necessary to protect intellectual property rights will satisfy the legitimate business justification standard, thereby giving appropriate protection to patent and copyright holders. It is far-fetched to suggest that any meaningful creative activity will be deterred by the inability of a patent or copyright holder to invoke its rights as a pretext as well.[12]

Although Kodak asserts that exploitation of intellectual property rights is necessarily compatible with the antitrust laws, that position is only partly correct: it has long been recognized that the antitrust laws place limits on the freedom of a patent holder to exploit its limited monopoly under the patent. Thus, for example, this Court has held that the Sherman Act bars a patentee from requiring purchase of a second product as a condition of gaining access to a patented one. *See, e.g., International Salt Co., supra.* Indeed, as the court of appeals noted (Pet. App. 41A), this Court in *Kodak* explicitly reaffirmed that "power gained through some natural and legal advantage *such as a patent, copyright,* or business acumen *can give rise to liability* if 'a seller exploits his dominant position in one market to expand his empire into the next.' " 504 U.S. at 479 n.29 (emphasis added) (quoting *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 611 (1953)).

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[12] Indeed, the standard urged by Kodak, amounting to antitrust immunity whenever a patent or copyright is involved, is rife with the potential for mischief. Kodak's standard would give companies an incentive to obtain a patent—even when doing so is not economically beneficial in traditional terms of improving quality or lowering costs—merely because the patent would amount to a license to destroy competition in downstream markets.

See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136 (1969) ("[T]here are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee."); *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) ("Possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly."); *Ford Motor Co. v. United States*, 405 U.S. 562, 576 n.11 (1972) ("Even constitutionally protected property rights such as patents may not be used as levers for obtaining objectives proscribed by the antitrust laws."); *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("On the other hand, a patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly, *i.e.* beyond the limits of what Congress intended to give in the patent laws."); *Panther Pumps & Equipment Co. v. Hydrocraft, Inc.*, 468 F.2d 225, 231 (7th Cir. 1972) ("Supreme Court has unequivocally condemned the use of a patent as a beachhead from which competition in unrelated lines of commerce may be assaulted"), *cert. denied*, 411 U.S. 965 (1973). While it plainly would enhance the value of a patent to allow unlimited power to refuse to sell patent goods except upon purchase of unpatented goods, the law does not regard that added incentive as necessary in order to stimulate inventive efforts. It is equally unnecessary to provide inventors with the dubious additional incentive of invoking copyrights or patent rights in a pretextual manner.[18]

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[18] By the logic of Kodak's theory, it could be argued that recognition of the so-called "sham" exception likewise weakens the constitutionally-rooted right to petition governmental officials or to file lawsuits. *See Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). But this Court has never found it essential to accord absolute immunity to those activities. Indeed,

There is certainly nothing in the authority cited by Kodak that compels an opposite conclusion. To begin with, although Kodak seeks to rely on the language of 35 U.S.C. § 271(d)(4), that provision applies only to cases, unlike this one, filed after November 19, 1988.[14] The cases cited by Kodak (Pet. 10-11) are similarly beside the point. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *Miller Insituform, Inc. v. Insituform of North America, Inc.*, 830 F.2d 606 (6th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642 (9th Cir. 1981). While those cases stand for the oft-reiterated principle that a patent or copyright holder has no general duty to deal with its competitors, that principle is not in dispute here: the Ninth Circuit explicitly acknowledged and agreed with it. *See* Pet. App. 41A ("[c]ase law also supports the right of a patent or copyright holder to refuse to sell or license protected work," citing *Westinghouse*,

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despite Kodak's heavy emphasis on *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993), that decision does not stand for the proposition that actions ostensibly protecting copyrights are entitled to *absolute* immunity. If that were so, it would follow that *any* suit to enforce a copyright, even a "sham" suit, would have to be treated as legitimate, just as Kodak insists that a pretextual reliance on patent rights must be. The decision in *Professional Real Estate Investors, Inc.* is contrary to that theory.

[14] Thus, to the extent that provision is relevant to analysis of the issue raised by Kodak, it would be appropriate for this Court to await a case in which the provision applies and, therefore, has been dealt with in the lower courts. Furthermore, with respect to the matter specifically addressed by the statute (*i.e.*, the criteria for patent misuse), this Court had simply held, prior to enactment of the statute, that a patent holder does not forfeit its right to sue for infringement solely because it has not offered to license its invention to an accused infringer. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 214-15 (1980).

648 F.2d at 647). None of those cases, however, addressed the specific question presented by this case—whether a patent or copyright holder may claim, as a business justification, a reason for refusing to deal (*i.e.*, protection of copyrighted or patented matter) that had nothing to do with its actual behavior—and thus none of the cases had any reason to consider whether a pretextual invocation of intellectual property rights should be accepted as though it were genuine. Indeed, insofar as it appears from the cases, there was no allegation in any of them that the companies refusing to deal in patented materials had done so as part of an indiscriminate refusal to sell patented and unpatented goods alike, let alone in an effort to monopolize a downstream market not encompassed within the scope of the patent or copyright. *See* Pet. App. 52A (distinguishing *Westinghouse, SCM, and Miller Insituform* on the ground that, unlike this case, they did not involve "a blanket refusal that included protected and unprotected products"). It was reliance on those facts, however, that prompted the Ninth Circuit to hold that the protection generally afforded to patent and copyright holders should not be extended to Kodak here.

In short, the decision below provides ample protection for patent and copyright holders without erecting a wholly unnecessary shield from antitrust liability for holders pretextually asserting their rights as a basis for anticompetitive behavior. Neither this Court nor any court of appeals has ever held that it is necessary for patent or copyright holders to be able to invoke their rights as a pretext, and nothing in the intellectual property laws or the antitrust laws requires it. There is thus no reason for review by this Court.

2. The broadest argument put forward by Kodak, though styled as its second question presented, is that the courts below applied the wrong standard to its refusals to deal. In the court of appeals, Kodak argued that courts

must apply the "essential facilities" doctrine, but its position now seems to be only that a proper standard (distilled from a survey of cases) must require proof of monopoly, unavailability, and essentiality. *See* Pet. 16-19. This issue, however, is a red herring: the Ninth Circuit, while it held that it was not required to apply the essential facilities doctrine in this case, did look to proof of the very elements that Kodak finds to be critical. Its holding that the evidence was sufficient to uphold the verdict is correct, and there is no reason for further review on this issue.

Before turning to this evidence, we should note that, if Kodak actually means that a court must employ the essential facilities doctrine *by its terms*, its argument is clearly off the mark. This Court, in both *Aspen* and *Kodak*, analyzed refusals to deal without itself employing the essential facilities language or indicating that instructions must be framed in that manner. *See Aspen Skiing*, 472 U.S. at 600-11; *Kodak*, 504 U.S. at 482-86. In *Aspen*, having upheld a jury verdict of monopolization under instructions providing that a monopolist may refuse to deal "if valid business reasons exist for that refusal" (472 U.S. at 597), the Court found it "unnecessary to consider the possible relevance of the 'essential facilities' doctrine." 472 U.S. at 611 n.44. In *Kodak*, this Court stated that "[i]f Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." 504 U.S. at 483. More specifically, after saying that "[i]t is true that as a general matter a firm can refuse to deal with its competitors," 504 U.S. at 483 n.32, the Court went on to declare that "such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal." 504 U.S. at 483 n.32. *See also Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). Nothing in that discussion—addressing the very claims that were tried on

remand—required that Kodak's conduct be analyzed according to the terms of the essential facilities doctrine.[15]

Kodak is thus left with a more generic argument: that courts must employ some sort of "objective criteria" to separate lawful from unlawful refusals to deal.[16] But the inquiry conducted by the Ninth Circuit did just that: in reviewing the jury's verdict, it looked to proof of precisely those elements—monopoly, unavailability, and essentiality—that Kodak finds to be necessary. Thus, the Ninth Circuit explicitly determined that Kodak had "monopoly power in the parts market." *See* Pet. App. 20A; *id.* at 19A ("[w]e hold that substantial evidence supports the jury's finding that Kodak controlled a monopoly share in the market for Kodak parts").[17] More particularly, the court stated that "given the state of the record, a reasonable jury could conclude that Kodak had a share of the markets for photocopier and micrographic equipment parts

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[15] The lack of reliance on the essential facilities doctrine in *Aspen* and *Kodak* is all the more noteworthy because, in each of them, the court of appeals had talked in terms of essential facilities. *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520-21 (10th Cir. 1984); *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 620 (9th Cir. 1990).

[16] Although Kodak describes its conduct as a unilateral refusal to deal, that description is actually incomplete. As the Ninth Circuit noted, and as the record shows, Kodak engaged in a scheme that featured its own refusals to deal, its efforts to prevent third parties from dealing with respondents, and various acts of retaliation against respondents and customers using respondents' services. *See* Pet. App. 4A, 19A.

[17] Kodak continues to object to the definition of the relevant market, arguing that the Ninth Circuit should have looked at the market for each of the thousands of parts rather than all parts. *See* Pet. 20; *id.* n.12. The Ninth Circuit correctly held, however, that the definition offered by Kodak was incompatible with "commercial realities," Pet. App. 11A, and that Kodak would likely lose even under its own theory. Pet. App. 16A. In any event, the resolution of that issue—whether the proper market is all parts or not—is case-specific and, therefore, obviously an issue of no general importance.

of 65% or more." Pet. App. 21A.[18] In addition, the court found sufficient evidence to "support a finding of high barriers to entry by new manufacturers and to increased output by established suppliers." Pet. App. 22A.

The court of appeals also addressed whether Kodak parts were otherwise available to service providers, finding substantial proof that they were not. Noting evidence of "a shortage of available substitutes" (Pet. App. 19A), the court found "unpersuasive[]" Kodak's argument "that the ISO's failed to prove that parts were absolutely unavailable." Pet. App. 19A. To the contrary, the court observed, "[t]he record contains substantial evidence showing that parts were virtually unavailable for post-1986 models and often difficult to obtain for older models." Pet. App. 19A. Indeed, while Kodak in its petition baldly asserts that parts "were available elsewhere" (Pet. 19; *see id.* at 21), the Ninth Circuit pointed to an admission by Kodak itself "that the availability of parts was 'limited.'" Pet. App. 19A.

Finally, the Ninth Circuit repeatedly stated that access to parts was necessary to compete in the service market. In defining the relevant market, the court stated that "[t]he 'commercial reality' faced by service providers and equipment owners is that a service provider *must have* ready access to all parts to compete in the service market." Pet. App. 11A (emphasis added). The court then repeated that fact, in various forms and contexts, throughout its analysis of respondents' Section 2 claim. *See* Pet. App. 12A ("[i]n the market for Kodak parts, a ready supply of all parts is needed to satisfy service contracts");

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[18] Kodak challenges the statement (Pet. App. 21A) that even a market share "near 50%" would suffice to support an attempted monopolization claim where, as here, there are significant barriers to entry and expansion. *See* Pet. 20-21. This Court need not consider the legal sufficiency of this evidence of attempt, however, because the court of appeals found sufficient evidence of a market share of 65% in this case.

Pet. App. 15A ("Kodak either manufactures or otherwise controls a monopoly share in most of the necessary parts"); Pet. App. 16A ("Kodak photocopiers and micrographic equipment require thousands of individual parts and a supply of all parts is necessary in order to fulfill service contracts"); Pet. App. 16A ("service providers need all parts to compete in the service market"). Indeed, it seems beyond serious question that access to parts is essential to provide service. For all of its various theories, even Kodak does not attempt to argue that it would be possible for respondents to offer service without parts.[19]

The approach taken by the Ninth Circuit thus assured that liability, even to the extent that it rested on a refusal to deal considered in isolation, was imposed only upon proof of each of the elements that Kodak deems important.[20] That proof established that Kodak was able to maintain a monopoly over service by denying access to necessary and otherwise unavailable parts over which it exercised monopoly power. Kodak may believe that the court of appeals should have found the evidence to be insufficient, but its dissatisfaction offers no reason for further review.

3. The final argument pressed by Kodak is that the Ninth Circuit mistakenly upheld the jury's finding of market power in a derivative aftermarket. But Kodak offers nothing new or important here. Its argument is a loose mixture of quarrels with the earlier decision in this

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[19] Kodak's contention that the ISOs grew rapidly despite the parts restrictions is misleading. In fact, the parts restrictions devastated the ISOs' ability to compete meaningfully against Kodak for service business. *See e.g.*, Pet. App. 4A (two plaintiffs and other ISOs were actually driven out of the service business); RT 1715-16, 1720-22, 2380-84, 3459-62; Exh. 132, 32, 123.

[20] To the extent that Kodak is objecting that the relevant instruction did not set forth those elements in the proper terms, it has waived that argument by its failure to challenge that instruction (No. 27). *See* Pet. App. 18A.

case and fact-specific disputes about the narrow ruling of the court below. None of its contentions is grounds for further review.

Much of the argument is, in effect, an invitation for this Court to revisit its earlier decision. But this invitation should be declined. The determination that Kodak may unlawfully exert monopoly power in derivative aftermarkets is law of the case.[21] As this Court observed last Term, "[u]nder this doctrine, a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997). Although the Court may depart from that doctrine, if it is " 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice,' " *id.* (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)), Kodak falls well short of meeting either prong of that standard.[22]

The rest of the argument amounts to a wholesale attack on the Ninth Circuit's ruling on the sufficiency of the evidence. But, in making this argument, Kodak labors under a heavy procedural obstacle—both in attacking the Ninth Circuit's holding and in promoting this case as an appropriate vehicle for further consideration by this Court.

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[21] The Court in Kodak held that, upon a proper showing, respondents could establish a § 2 claim with respect to the parts and service aftermarkets, even if Kodak did not have monopoly power in the equipment market. 504 U.S. at 482-86. *See also* 504 U.S. at 464-79. Kodak obviously thinks little of that holding, *see* Pet. 24-28, but it remains binding under traditional principles of law of the case.

[22] Although Kodak claims that a " 'torrent' " of litigation has followed the Kodak decision, Pet. 25, Pet. App. 104E-105E, the majority of cases cited by Kodak were, in fact, instituted *before* Kodak was decided. Thus, by Kodak's own figures, there have been fewer cases filed in the six years since *Kodak* than in the six years preceding it. Further, some of those cases involve tying claims. Because this case no longer contains a tying claim, any decision in this case will provide, at best, incomplete guidance for the resolution of those cases.

Because Kodak failed to move for judgment as a matter of law on the sufficiency of the evidence on this issue, as required by long-established and clear precedent, the Ninth Circuit reviewed this contention "only for plain error." Pet. App. 32A. According to that standard, reversal of the jury's findings about the service market was possible "only if there is an absolute absence of evidence to support the jury's verdict." Pet. App. 32A-33A (internal quotes omitted). The court of appeals accordingly rejected Kodak's challenge to the verdict under that strict standard.

That ruling presents no basis for further review, for the evidence in the record plainly satisfied that (and, indeed, the usual) standard of appellate scrutiny. As the Court noted, the record reflected, among other things, that Kodak had extremely high (95% and 88%) shares of the relevant service markets. Pet. App. 33A. In addition, the court said, "the ISOs presented evidence that Kodak earns supracompetitive profits in service, and overall." Pet. App. 33A.[23] Specifically looking at issues previously addressed by this Court, the court of appeals found evidence that "Kodak equipment customers experience the 'lock-in' and information imperfections as described in *Kodak*." Pet. App. 33A. It thus rejected Kodak's aftermarket argument, concluding that "[s]ubstantial evidence supports the jury's verdict on the issue of Kodak's service market monopoly." Pet. App. 33A.

To rebut these findings, Kodak largely sets forth its own view of the evidence. For example, Kodak contends that, "no matter what the Ninth Circuit says" (Pet. 28), it never changed its policy toward selling photocopier parts to its rivals. Pet. 28. In fact, there was substantial evidence that Kodak adopted the parts restrictions after competition had arisen, based on access to parts, that

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[23] Although Kodak contends (Pet. 2) that it sold its copier business because of unprofitability, that claim is devoid of support in the record.

threatened its service monopoly. RT 816, 1496-97, 2302-03, 2855. Indeed, the Ninth Circuit pointed to evidence that the restrictions on photocopier parts were adopted only after one plaintiff lured a large service account, the State of California, away from Kodak. Pet. App. 36A; RT 2819, 2837; Exh. 943. Kodak also claims that the restrictions on micrographics parts were "prospective only," operating only on equipment sold after the restrictions were announced. Pet. 28. Again, the record shows that the restrictions cut off parts for some advanced equipment that had been on the market for years before the restrictions were announced. RT 2174-76, 2374-75, 2808-10.[24]

There is no need to go over this ground again. The Ninth Circuit correctly upheld the verdict under the properly limited standard of review available to Kodak after its procedural default. Further review by this Court is unnecessary and unwarranted.

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[24] Kodak also ignores or misstates other record evidence refuting its theory that it was unable to exploit service customers. Substantial evidence established that the equipment markets were not competitive. *See, e.g.*, Exhs. 190, 721, 724-26, 763-64, 898-99. Indeed, some models of Kodak equipment have no substitutes. *See, e.g.*, RT 1722-24, 2895-2900, 3892-96, 5404-05. Lastly, for most of the relevant time period, Kodak's only competitive manufacturer of photocopiers (Xerox) employed parts restrictions similar to Kodak's. RT 999-1001, 1298-1300, 1314.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted,

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